Supreme Court, U. S.
FILED
JAN 31 1979

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 77-1052

EDWARD BUTKER,

Petitioner,

vs.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

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October 20, 1977
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

BEFORE THE ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation	) AB-4293a
	) File 40512; Reg. 3551
Against	) ALJ: Green
	)
EDWARD A. BUTKER	) Date and Place of
dba The Bucket	) Hearing:
10909 Hawthorne Boulevard	) July 28, 1977
Lennox	) 314 West First Street
	) Los Angeles, California
Respondent and Licensee	)
	) For Department:
On-sale beer and wine license	) Honorable Evelle J.
	) Younger, Attorney
Under the Alcoholic Beverage	) General
Control Act.	) Richard Radosh
	) Deputy Attorney General

For Appellant:
Stephen Warren
Solomon, Esq.

The Department of Alcoholic Beverage Control has filed a motion to dismiss the appeal in this case upon the ground that the Appeals Board lacks jurisdiction.

Pursuant to the provisions of section 23095 of the Alcoholic Beverage Control Act, appellant petitioned the department for permission to make an offer in compromise, viz.: to pay a fine rather than serve the period of suspension provided for in the department's decision. By statute, such a petition may be filed with the department only when the department's decision has become final; that is, as a prerequisite to filing such a petition with the department, the licensee's right of appeal must have been exhausted, or the licensee has failed to exercise same (Business and Professions Code section 23095[1]).

1/ Business and Professions Code section 23095 provides in pertinent part:

> "Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise, to be paid into the Alcohol Beverage Control Fund, consisting of a sum of money in lieu of serving such suspension."

Settlement of a pending matter is provided by Business and Professions Code section 23087, which states:

> "Whenever any matter is pending before the board or a court of record involving a dispute

(continued on p. 3)

The department, by use of Form No. ABC-162, wherein appellant expressly waives his right of appeal, permits an offer in compromise to be filed pursuant to the provisions of Business and Professions Code section 23095 prior to the time contemplated therein; viz.: the decision of the department having become final (1) by failure of the licensee to appeal the decision, or (2) by exhaustion of all appeals. This has the effect of causing the department's decision to become final. Such action may be motivated by the desire of some licensees who do not wish to appeal the decision of the department and, thus, not wait until the appeal time has run before seeking a monetary settlement in lieu of a suspension. It would appear the utilization of such a procedure, under the above-described circumstances (the time for filing an appeal not yet having expired), places a burden upon the department to be certain that the licensee is clearly apprised of the fact that: (1) he is thereby waiving his right of appeal, and (2) there is no commitment by the department to accept the offer presented.

1/ (continued from previous page)

> between the department and a licensee, petitioner or protestant and the parties to such a dispute agree upon a settlement or adjustment thereof, the tribunal shall upon the stipulation by the parties that such an agreement has been reached, remand the matter to the department."

The history of the instant case is that the Appeals Board had affirmed the decision of the department with regard to the instant violations on December 22, 1976. A Petition for Hearing was denied by the California Supreme Court on March 31, 1977. The petition now before us was subsequently filed on June 2, 1977. This was after the department's decision became final. Also, the petition contains the provision that appellant does "waive all rights to appeal and judicial review of the Department's decision suspending my license in the above-noted registered case."

The department has now denied said petition for an offer in compromise and seeks to suspend the license pursuant to the final decision regarding the violations. Appellant sophistically contends that his waiver of all appeal rights did in fact waive his right to appeal the suspension imposition, yet he seeks to avoid said suspension imposition by this appeal.

We have held in previous decisions that, in the absence of a showing that such a petition was entered into through constructive fraud, inadvertence, mistake or other grounds for equitable relief, the waiver of the right of appeal is effective; none of said grounds have been raised before the board herein. (Appeals of Leonard, AB-2871 and Leybourne, AB-2884.) Moreover, if equitable rights were involved herein, appellant has not exhausted his administrative remedies because, as we stated in Appeal of Tedford, AB-1206 (at p. 4):

> "If the facts would support constructive fraud, mistake or other ground for equitable action, counsel's argument and motion should have been directed to the Department." (Emphasis added.)

We also stated in Appeal of Tedford, supra:

> "It is the opinion of this Board that an order or notice issued by the Department of Alcoholic Beverage Control under Section 23095 of the Alcoholic Beveral Control Act denying an offer in compromise is not appealable to this Board. Section 22, Article XX of the Constitution, reads in part:
>
> "'When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision * * *.'" (Emphasis added.)
>
> "Section 23080 of the Alcoholic Beverage Control Act definies 'decision':
>
> "'As used in this article "decision" means any determination of the department imposing a penalty

assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution.'" (Emphasis added.)

"Section 23081 of the Alcoholic Beverage Control Act states that an appeal may be filed within 40 days after the decision of the Department is delivered or mailed to the parties. It is the Board's opinion that the action of the Department in denying an offer in compromise is not a 'decision' as defined in Section 23080 of the Alcoholic Beverage Control Act."

Here there was no order of a penalty or suspension (see: Section 22, Article XX, California Constitution), merely a refusal by the department to modify a penalty order previously final vis-a-vis appellate review.

Finally, under the terms of section 23095, the department entertains a petition to make an offer in compromise only in cases where the decision of the department has become final; from the context of section 23095 it is apparent this means final as to all appeal rights having been terminated; the Legislature was quite clear in its expression of this requirement.

For all of these reasons, the motion of the Department of Alcoholic Beverage Control to dismiss the appeal is hereby granted.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Patricia Wilkey
Eugene V. Lipp